

1991

RICHARD D. MADSEN and NANCY
MADSEN, his wife, BOYD A. SVENSEN and
BEATRICE SWENSEN, his wife, HOPE A.
HILTON, BLAINE ANDERSON and SHEREE
ANDERSON, his wife, CYNTHIA HILTON,
RALPH M. HILTON, GENE HELLAND and the
MIDDLE EAST FOUNDATION v. MIRVIN D.
BORTHICK, W. SMOOT BRIMHALL, and
JOHN DOES I TO V, being former
Commissioners of the Utah Department of
Financial Institutions : Unknown

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IN THE UTAH SUPREME COURT

RICHARD D. MADSEN and
NANCY MADSEN, his wife,
BOYD A. SWENSEN and BEATRICE
SWENSEN, his wife, HOPE
A. HILTON, BLAINE ANDERSON
and SHEREE ANDERSON, his wife,
CYNTHIA HILTON, RALPH M.
HILTON, GENE HELLAND and
the MIDDLE EAST FOUNDATION,

Plaintiffs/Appellants,

vs.

MIRVIN D. BORTHICK, W. SMOOT
BRIMHALL, and JOHN DOES
I TO V, being former
Commissioners of the Utah
Department of Financial
Institutions,

Defendants/Respondents.

FIRST PETITION FOR
JUDICIAL NOTICE

Case No. 19704

FILED

JUN 20 1986

Clerk, Supreme Court, Utah

During oral argument, Justice Zimmerman asked a question with respect to the following language from Madsen v. Borthick, 658 P.2d 627, 631 (Utah 1983):

While plaintiffs' allegations that defendant Borthick had "wholly failed to discharge" his statutory duties and responsibilities might be construed as an allegation of a negligent omission, plaintiffs expressly disavowed that construction by conceding in the district court that the cause of action did not fall under any of the statutory exceptions to immunity. [Emphasis added.]

In order to more fully respond to that question, plaintiffs ask the Court to take judicial notice¹ of the pleadings in the underlying case. (Exhibits A and B hereto.)

From these pleadings, it appears that there was no binding concession in the trial court. The State of Utah had based its motion squarely and solely on the failure to file a notice of claim. At most, plaintiffs conceded that, "It appears that plaintiffs' claim does not fall under any of those statutory exceptions [to governmental immunity]." (See Memorandum in Opposition to Defendant's Motion to Dismiss, Exhibit A, at p. 1.)

¹Judicial notice may be taken at any stage of the proceeding. Rule 201(f), Utah Rules of Evidence.

Since the only issue before the trial court was failure to file the notice of claim, the dismissal of the lawsuit had to be based on that sole (procedural) reason.²

RESPECTFULLY SUBMITTED this 18 day of June, 1986.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellants

By: Robert Debry

²The true reason that plaintiffs failed to file a notice of claim below was a tactical decision:

Counsel for plaintiffs advised the Court in his brief and at oral argument that he did not wish to base his cause of action on any exception to the Governmental Immunity Act since this might subject the depositors (1) to a ceiling on the amount of their recovery (§ 63-30-34), (2) to a substantial problem of class certification, and (3) to a shorter statute of limitations than would apply if their cause of action were rooted in a common-law claim (e.g., compare § 78-12-26(4) with § 78-12-25(2)).

Madsen v. Borthick, supra at p. 631 n. 7.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing FIRST PETITION FOR JUDICIAL NOTICE (Madsen, et al. v. Borthick, et al.) was mailed, U.S. Mail, postage prepaid, this 18 day of June, to the following:

David L. Wilkinson
Attorney General
Stephen J. Sorenson
Assistant Attorney General
Paul M. Warner
Assistant Attorney General
Chief, Litigation Division
Attorneys for Respondents
115 State Capitol
Salt Lake City, Utah 84114

Linda S. Allen

Exhibit A

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

-VS-

MIRVIN D. BORTHICK, Connis- :
sioner of the Utah Department :
of Financial Institutions; and : Civil No. C-81-1790
the STATE OF UTAH, :
Defendants. :

COME NOW the defendants in the above-entitled matter by and through their attorney, Stephen J. Sorenson, Assistant Attorney General, and move the Court for an order dismissing this action on the grounds that the plaintiffs have failed to comply or to allege compliance with provisions of the Utah Governmental Immunity Act, Sections 63-30-1 et seq., Utah Code Annotated, 1953, as amended.

The basis for this Motion is more fully set out in the Memorandum in Support of Defendants' Motion to Dismiss on file herein. The defendants expressly preserve any and all other bases

for dismissal of this action which they may subsequently wish
to rely upon, should this action survive or be brought again.

DATED this 27th day of March, 1981.


STEPHEN J. SORENSON
Assistant Attorney General

DAVID L. WILKINSON
Attorney General
STEPHEN J. SORENSON
Assistant Attorney General
115 State Capitol
Salt Lake City, Utah 84114
Telephone: 533-6684

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

- - - - -

RICHARD D. MADSEN and :
NANCY MADSEN, his wife; :
BOYD A. SWENSEN and BEATRICE :
SWENSEN, his wife; HOPE A. :
HILTON; BLAINE ANDERSON and :
SHEREE ANDERSON, his wife; :
CYNTHIA HILTON; RALPH M. :
HILTON; MIDDLE EAST FOUNDA- :
TION; and GENE A. HELLAND, :
on behalf of themselves and :
all others similarly situated, :

Plaintiffs, :

-vs-

: MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION
TO DISMISS

MIRVIN D. BORTHICK, Commis- :
sioner of the Utah Department :
of Financial Institutions; and :
the STATE OF UTAH, :

Defendants. :

Civil No. C-81-1790

- - - - -
FAILURE TO COMPLY WITH THE CLAIM REQUIREMENTS
OF THE UTAH GOVERNMENTAL IMMUNITY ACT OR TO
ALLEGE COMPLIANCE WITH THOSE REQUIREMENTS IS
FATAL TO THE PLAINTIFFS' ACTION, AND THEIR
COMPLAINT SHOULD BE DISMISSED.

Utah Code Annotated, Section 63-30-11, a section of
the Utah Governmental Immunity Act, states in pertinent part:

Any person having a claim for injury to
person or property against a governmental entity
or its employee shall, before maintaining an
action under this act, file a written notice of
claim with such entity for appropriate relief in-
cluding money damages. The notice of claim shall
set forth a brief statement of the facts and the

nature of the claim asserted, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity within the time prescribed in section 63-30-12 or 63-30-13, as applicable.

Regarding the time period in which a claim against the State must be filed, Utah Code Annotated, Section 63-30-12 provides:

A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises.

Therefore, as a condition precedent to maintaining an action against the State of Utah or its employee, a plaintiff must have filed a written notice of claim with the State within one year after the purported cause of action arises.

In the instant matter, the defendants are the State of Utah and Mirvin D. Borthick, an employee of the State for whom the State is providing legal representation pursuant to Utah Code Annotated, Section 63-48-3. The plaintiffs have filed no notice of claim, either with the Utah Attorney General's Office or with the Utah Department of Financial Institutions, of which Mr. Borthick is Commissioner, and their Complaint fails to allege that any such notice has been made.

In Sears v. Southworth, 563 P.2d 192 (Utah, 1977), the Court upheld the constitutionality of the notice requirement under equal protection attack, finding the requirement rationally based in allowing governmental units promptly to investigate claims and remedy defects, avoiding unnecessary litigation, and minimizing difficulties arising from changes in administrations. The Court also reaffirmed the principle that knowledge by government employees of circumstances surrounding a claim does not dispense with the necessity of filing a timely written claim. The Court has also found an adequate basis for dismissal of a complaint the failure to allege compliance with the notice requirements, both where only

the State was the defendant, Walton v. State Road Commission,
558 P.2d 608 (Utah, 1976), and where both a state commission
and its chairman were defendants, Roosendaal Construction &
Mining Corp. v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972).

The statutory directive is clear and of settled validity,
and the plaintiffs' failure to follow the claim procedure requires
that this action be dismissed.

DATED this 27th day of March, 1981.



STEPHEN J. SORENSON
Assistant Attorney General

Exhibit B

ROBERT J. DEBRY
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RICHARD D. MADSEN and)	
NANCY MADSEN, his wife,)	
BOYD A SWENSEN and)	
BEATRICE SWENSEN, his wife,)	
HOPE A. HILTON, BLAINE ANDERSON)	MEMORANDUM IN OPPOSITION
and SHEREE ANDERSON, his wife,)	TO DEFENDANTS' MOTION TO
CYNTHIA HILTON, RALPH M. HILTON,)	DISMISS
MIDDLE EAST FOUNDATION and)	
GENE A. HELLAND, on behalf of)	
themselves and all others)	Civil No. C-81-1790
similarly situated,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
MIRVIN D. BORTHICK, Commissioner)	
of the Utah Department of)	
Financial Institutions, and the)	
STATE OF UTAH,)	
)	
Defendants.)	

INTRODUCTION

Plaintiffs seek to sue the State of Utah. Defendants move to dismiss on the basis of governmental immunity. Defendants argue that the state is absolutely immune from suit except as consent has been given under the Governmental Immunity Act (§63-30-1 et. seq. U.C.A.). Defendants further argue that plaintiffs cannot take advantage of the Act because they have failed to file the statutory notice pursuant to §63-30-11 U.C.A.

However, there is good reason why plaintiffs did not file notice under the Act. The Act is not a blanket authorization to sue the state in all instances. The Act permits suit only in certain limited cases. See §63-30-5 through 10 U.C.A. It appears that plaintiffs' claim does not fall under any of those statutory exceptions.

Thus plaintiffs have no cause of action under the statute. And there was no reason to file a notice claim pursuant

to the statute. Rather, plaintiffs seek to establish a non-statutory cause of action. Plaintiffs may pursue that non-statutory claim without filing notice under the statute (§60-30-11 U.C.A.) El Rancho Enterprises v Murray City Corp. 565 P.2d 778 (Ut. 1977).

POINT ONE

PLAINTIFFS' CLAIM IS NOT BARRED BY STATUTORY IMMUNITY

One source of governmental immunity is the statute itself. However, the legislature only adopted part of the common law doctrine of governmental immunity. Here is the operative language:

Except as may be otherwise provided in this Act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function. §60-30-3 U.C.A.

The key words are: exercise and discharge of a governmental function. In other words, governmental immunity is preserved where the state exercises or discharges some governmental act. However, immunity is not preserved where the state fails to exercise or discharge some governmental act. Thus, acts of commission fall under the statute. Acts of omission do not.

This analysis is confirmed by using the tool of statutory construction known as Expressio unis est exclusio alterius -- Express mention of one thing implies the exclusion of others. Of similar import, see Expressum facit cessare tacitum.

The rule has been described as follows:

The oldest law of the Romans recognized no will as in existence other than the spoken will, the dictum. What is not spoken is not willed, and vice versa, only that is willed that is spoken.

2 Danz, Geschichte des Romischen Rechts §142

This maxim has been widely employed as a tool of statutory construction. See, e.g.,

Marbury v. Madison, 1 Cranch 137, 175;
Ex Parte McCardle, 7 Wall 506 (1868);
Lukens Steel Co. v. Perkins, 107 F.2d 627, 640
(App. D.C. 1939);

Saxon v. Georgia Ass'n. of Independent Ins. Agents,
399 F.2d 1010, 1013, 1014 (5th Circ. 1968);
Hawkeye Chemical Co. v. St. Paul Fire and Marine
Ins. Co., 510 F.2d 322, 327 (7th Cir. 1975).

The statute clearly covers acts of commission. By applying the maxim, we see that acts of omission are excluded from the statute.

Plaintiffs claim that the state has failed or omitted to supervise the Grove Finance Company as required by statute. (See Complaint). Since the Governmental Immunity Act does not confer immunity for omission, plaintiffs claim is not barred by the Act.

POINT TWO

PLAINTIFFS CLAIM IS NOT BARRED BY COMMON LAW GOVERNMENTAL IMMUNITY

There are two sources of governmental immunity: the statute (Governmental Immunity Act) and the common law.

We have seen in Point One that plaintiffs' claim is not barred by statutory governmental immunity. However, plaintiffs' claim is still subject to dismissal if it falls under the common law grant of governmental immunity.

Utah courts have long espoused the common law doctrine of governmental immunity. However, the doctrine has been adopted with little or no critical analysis. The time has come for a reappraisal.

The entire concept of governmental immunity is an historical accident. A majority of jurisdictions have judicially abolished the doctrine in some degree. Jones v State Highway Comm 557 S.W.2d 225, 227 N.1 (Mo. 1977) lists 29 states which have judicially abolished or modified the doctrine. Commentators have almost unanimously rejected the doctrine. Borchard, Government Liability in Tort (I-VIII). 34 Yale L.J. 1, 757, 1039 (1926), 28 Colum.L.Rev. 577, 734 (1928); Prosser, Torts §111 at 970-987 (4th ed. 1971); Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U.Ill.L.R. 919.

The problem is that the doctrine of governmental immunity was imported from England. However, as the Supreme Court of Illinois has stated:

"...in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of Kings' on which the theory is based."

Moliter v Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89, 94 (Ill. 1959). See also Mayle v Pennsylvania Dept. of Highways, 388 A.2d 709 (Penn. 1978).

Therefore, the court should judicially abolish what remains of governmental immunity.

POINT THREE

GOVERNMENTAL IMMUNITY -- WHETHER BY STATUTE OR COMMON LAW -- IS UNCON- STITUTIONAL

Article 1 §11 of the Utah Constitution states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

That section is -- on its face -- the antithesis of doctrine of governmental immunity. Under governmental immunity, citizens do not have a "remedy by due course of law" if they are wronged by the state.

Of course, the Governmental Immunity Act partly lifts the curtain. Under the Act, certain claims may be made against the state "by due course of law." However, there are many claims which are not waived by the Governmental Immunity Act. The Act provides for suits against the state in limited areas.¹ However, except for those limited areas, governmental immunity remains an absolute bar:

¹ §63-30-5 Contract obligations waived
§63-30-6 Real property claims waived
§63-30-7 Negligent operation of vehicles waived
§63-30-8 Defective highway conditions waived
§63-30-9 Defective public buildings waived
§63-30-10 Negligent act of employee partially waived

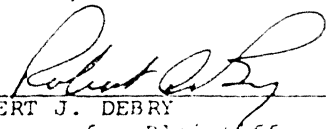
"Except as may be provided in this act, all governmental entities shall be immune from suit..." §63-30-3 U.C.A.

Thus, the Governmental Immunity Act is certainly constitutional insofar as it permits some claims to be made against the state. However, the Act is unconstitutional (under Article I, Section 11) insofar as other claims are prohibited.

CONCLUSION

Defendants seek to have plaintiffs' claim dismissed because no claim was filed pursuant to §63-30-11 U.C.A. However, plaintiffs' claim is not barred by the Governmental Immunity Act. Moreover, the entire concept of governmental immunity is an anachronism and unconstitutional. Therefore, there was never any reason for plaintiffs to file notice under the Governmental Immunity Act.

DATED this 30 day of April, 1981.


ROBERT J. DEBRY
Attorney for Plaintiffs

MAILING CERTIFICATE

This is to certify that a copy of the foregoing Memorandum in Opposition to Defendants' Motion to Dismiss was mailed, postage prepaid, to Stephen J. Sorenson, Assistant Attorney General, attorney for defendants, 115 State Capitol, Salt Lake City, Utah 84114, this 30 day of April, 1981.

